

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

ALGER GROUP, L.L.C.¹

Employer

and

CASE 7-RC-21546

LOCAL 486, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

APPEARANCES:

George J. Miller, Attorney, of Lexington, Kentucky, for the Employer.

Wayne A. Rudell, Attorney, of Dearborn, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

¹ The Employer's name appears as corrected at the hearing.

² Both parties filed timely briefs, which were duly considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The Employer owns and operates about 28 cemeteries and mausoleums throughout Michigan. The parties stipulated to the appropriateness of a bargaining unit consisting of about 10 full-time and regular part-time grounds and indoor maintenance employees employed at 5 facilities in the tri-city area of Saginaw, Bay City and Midland. These facilities are the Oakwood Mausoleum, Roselawn Cemetery and Eastlawn Cemetery in Saginaw; the Elmlawn Cemetery in Bay City; and Midland Memorial Gardens in Midland. At issue is the status of five superintendents and eight seasonal workers.³ The Employer contends that all five superintendents are ineligible as supervisors. The Petitioner agrees only with respect to two of them, David VanderMeer and Hector Ybanez. Regarding the seasonal employees, the Employer maintains that they are eligible voters. The Petitioner asserts that the record is too undeveloped to permit either a class or individual finding, and that consequently the seasonal employees should be allowed to vote subject to challenge.

Each burial facility has a superintendent, also sometimes called supervisor, who serves as the Employer's highest on-site representative over the grounds and indoor maintenance personnel. The superintendent is responsible for preparing burial sites, maintaining the condition of the grave sites, making landscape improvements, keeping the grounds attractively manicured and -- at the two facilities with mausoleums -- maintaining the structural integrity and cleanliness of those indoor spaces. The superintendents spend from six to eight hours each day either performing or monitoring the progress of these tasks. They are assisted by the following support personnel:

<u>Name of Facility</u>	<u>Grounds Supt.</u>	<u>Number of Full-time</u>	<u>Number of Part-time</u>	<u>Number of Seasonal</u>
Elmlawn	D. VanderMeer	1	0	5
Eastlawn	J. Newman	1	0	0
Midland	H. Ybanez	1	1	1
Oakwood	J. DuPuis	0	2	0
Roselawn	T. DuPuis	3	1	2

³ The term "seasonal" has a specific definition under Board law. It is used by the Employer to refer to the employees hired primarily to perform groundskeeping during the growing season. The term shall be used herein to reflect the Employer's nomenclature and not necessarily to presage a legal conclusion.

Regional superintendent Steve Garske oversees maintenance and construction at half of the Employer's 28 Michigan facilities. Although he serves as the direct supervisor of the 14 superintendents under his command, the vast percentage of his job is devoted to managing construction projects. Thus, Garske spends the majority of his time with outside contractors. He has little if any direct contact with the facilities' support personnel and meets with the superintendents under his charge only about four times a year.

The superintendents, and full-time and part-time employees are employed year-round. The seasonal workers are hired for the busy period, which normally begins in April and lasts until November or December, when the grass no longer grows. While employed, seasonal workers average 40 hours of work per week. Although Garske sets the number of seasonal employees to be hired, the record contains one example of a superintendent effectively recommending the hire of an additional seasonal worker based upon his judgment as to the needs of the facility. How the superintendent solicits seasonal job candidates and whom he chooses for hire is within his total discretion. Garske does not participate in the advertising, interviewing or selection process.

Superintendents usually give seasonal employees the simplest chores, such as mowing the lawn, trimming weeds and planting flowers. The remaining jobs, including digging graves, operating the backhoe, lettering crypts and setting grave markers, are allocated among the permanent staff, based upon the superintendent's assessment of employees' skills and his deference to employees' predilections. The superintendent checks all work for quality. If he believes that a job has been improperly performed, he instructs the employee to re-do it.

Because funerals routinely occur on weekends and holidays, there are plentiful overtime opportunities. Although it appears that they frequently assign the available days by rotation, the superintendents are free to develop other methods of distributing the overtime work. Garske oversees the overtime cost but not the allocation system. If needed, the superintendents may require employees to work overtime.

The record suggests that superintendents seldom resort to written discipline. However, it is clear that they have the authority to issue it based upon their investigations and conclusions, and to cause it to be placed in employees' personnel files.⁴ There is no evidence that Garske or the Employer's human resources officials in Ann Arbor ever undertake independent investigations of employee discipline or other personnel matters. It also appears that the Employer at least theoretically has a progressive disciplinary system, although the record is barren of examples that it has been invoked to justify a discharge.

⁴ It appears that a set of personnel files is kept in the Employer's corporate office in Ann Arbor, another in Garske's office and another on site with the facility administrator. Superintendents have access to the latter set. One superintendent testified that he maintains personnel files in the desk in his office. This seems to be his personal practice, not an Employer requirement.

The record does not indicate who decides the number of hours that part-time employees work. However, the superintendent has authority to decide at what times and on what days those hours will be worked. An example is that one superintendent generally excuses a part-time indoor cleaning employee when she misses regular work hours to stay at home with an ill child, and allows her to make up the hours on non-scheduled days. As this example implies, superintendents are also entitled to pass upon the reasonableness of an absence.

The length of vacation is determined by the Employer based upon time in service. The Employer prohibits the taking of vacations in May, the busiest month. Otherwise, superintendents are free to schedule vacations and other time-off requests by support personnel as they see fit. One superintendent asks for one week's notice; another requests one month. When absences and vacations unmanageably reduce the facility's staff, the superintendent initiates a temporary transfer of maintenance personnel by contacting a fellow superintendent. There is no evidence that these temporary transfers, which are common, must be approved in advance by upper management.

The record contained evidence of only one discharge. The misconduct and poor performance of the employee in question had prompted one superintendent to recommend to Garske that the employee be disciplined under the progressive disciplinary system and ultimately fired. Garske instead transferred the employee to another facility. When the employee's behavior failed to improve, the second superintendent on his own simply terminated the employee, without obtaining Garske's prior assent. There is no suggestion in the record that the second superintendent's action was considered *ultra vires*.

Superintendents' recommendations of employee wage increases have met with mixed success. Although Garske sometimes countermands such recommendations, he does so purely for budgetary reasons and not because he has arrived at a contrary opinion of the worthiness of the candidate. As noted above, Garske has virtually no contact with maintenance employees, nor does he independently evaluate them. The level and eligibility for benefits such as medical insurance and 401(k) pension plans are determined by the Employer. Only superintendents and other full-time employees receive fringe benefits. On the other hand, superintendents may make other recommendations affecting tenure and compensation. For example, one superintendent effectively recommended that two seasonal workers be retained throughout the winter months. Without prior approval, he also promoted a seasonal employee to a full-time position with a full complement of fringe benefits. Moreover, he effectively recommended that a seasonal employee in his charge be promoted to superintendent.

Superintendents have their own offices. They review, adjust and initial time cards. Periodically, they meet with Garske to discuss budgetary and personnel matters. They solicit bids from outside contractors. The superintendents are responsible for maintaining an adequate stock of inventory and supplies. They routinely make purchases valued up to \$100 without obtaining a purchase order, and in emergencies they may pledge the Employer's credit greatly in excess of that figure to obtain the requisite service or equipment. Their business cards list their title as either superintendent or supervisor. Though hourly paid, their rates are

twice that of seasonal workers and about 50 percent more than that of the permanent maintenance staff.

Contrary to the Petitioner's contention on brief, no record evidence suggests that the superintendents have been vested by the Employer with discrepant degrees of authority. They all share the same position at their respective facilities, perform the same manual tasks and discharge the same responsibilities. Rather, it appears that, due to differences in personality and opportunity, they have exercised their authority with varying frequency.⁵ However, the possession rather than the exercise of supervisory authority is the determinative factor.

Boardwalk Motors, 327 NLRB No. 142, slip op. at 8 (Feb. 26, 1999); **Groves Truck and Trailer**, 281 NLRB 1194 fn. 1 (1986). Supervisory status is not lost because the individual infrequently exercises the authority. **DST Industries, Inc.**, 310 NLRB 957, 958 (1993); **Big Rivers Electric Corp.**, 266 NLRB 380, 382 (1983). Consequently, parsing the status of each superintendent individually is neither necessary nor appropriate.

Possession of any one of the attributes enumerated in §2(11) of the Act is enough to convey supervisory status. **Union Square Theatre Management, Inc.**, 326 NLRB No. 17 (Aug. 17, 1998); **Big Rivers Electric Corp.**, supra. The superintendents possess several such attributes. They have complete discretion to hire whomever they want. Their independent judgment regarding job performance is the sole predicate for the issuance of employee discipline up to and including discharge. They effect temporary transfers, and effectively recommend promotions. In addition to these primary indicia of statutory supervisory status, they exhibit secondary indicia such as their responsibility for scheduling vacations, assigning overtime and adjusting time cards.

The nature of the maintenance work in question is relatively routine. As a result, the superintendents are not called upon to exercise much independent judgment when making job assignments. However, in light of their undeniable supervisory authority in other areas, it is immaterial that the superintendent's assignment of work tends to be routine. **Holly Farms Corp.**, 311 NLRB 273, 297-98 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996). Nor does the extent of their own manual labor defeat their status. **Union Square Theatre Management, Inc.**, supra; **Laser Tools, Inc.**, 320 NLRB 105, 108 (1995); **Concourse Village, Inc.**, 276 NLRB 12 (1985).

That superintendents' pay raise recommendations are not uniformly followed does not by itself undermine their status. The fact that recommendations are subjected to additional scrutiny and not rubber-stamped is implicit in any hierarchical system. The power to reject a recommendation is not inconsistent with the authority to effectively recommend. **Ryder Truck Rental, Inc.**, 326 NLRB No. 149, slip op. at 3 (Sept. 30, 1998) (dissenting opinion).

⁵ The influence of opportunity and perhaps personality explains why Hector Ybanez, a new superintendent of three employees who is still in his trial period, appears to exercise his authority more often than does Jim Newman, a nine-year veteran who oversees only one employee.

In the absence of upper management contact with employees or oversight of daily operations, superintendents are the only persons to develop knowledge about employee skills, attitudes and work habits. Concluding that superintendents are employees would mean that the maintenance support staffs are virtually unsupervised. Avoidance of this impractical result is another, albeit not a determinative, factor militating in favor of a supervisory finding. *Laser Tools, Inc.*, supra at 108; *Essbar Equipment Co.*, 315 NLRB 461 (1994).

For the foregoing reasons, I find that Joshua DuPuis, Todd DuPuis, Jim Newman, David VanderMeer and Hector Ybanez are supervisors within the meaning of the Act and excluded from the petitioned-for unit.

Permanent and seasonal employees are commonly supervised. They work together on many projects. Although seasonal workers do not enjoy the same fringe benefits and earn roughly \$1 or \$2 less per hour than the permanent non-supervisory staff, they work the same basic schedule of 40 hours per week. The evidence that one seasonal employee was elevated to superintendent after three seasons, and that at least one other seasonal employee obtained a full-time position, shows that employment as a seasonal worker can be viewed as a rung in the promotional ladder.

Seasonal employees are generally not informed at the time of hire exactly how long their tenure will be. The reason for the indefiniteness is due mostly to the vagaries of the weather, which is the normal determinant of a seasonal employee's layoff. However, there is the possibility that seasonal employees may be retained over the winter, as occurred recently. Seasonal workers who reapply in a subsequent season are given preference in hiring. At the time of the hearing, all five seasonal workers at Elmlawn, and one of the two seasonal employees at Roselawn, worked for the Employer in previous years. Thus, six of the eight seasonal employees at issue are rehires.

In assessing whether seasonal employees are eligible voters, the Board places primary reliance upon their expectation of future employment. Factors weighed in this analysis include the size of the area labor force, the stability of the employer's labor requirements, the extent to which the employer is dependent upon seasonal labor, the actual reemployment figures and the employer's recall or preference policy. *Macy's East*, 327 NLRB No. 22 (Oct. 30, 1998); *L & B Cooling, Inc.*, 267 NLRB 1, 2 (1983), enf'd. 757 F.2d 236 (10th Cir. 1985); *Maine Apple Growers*, 254 NLRB 501, 502 (1981).

The Employer has a history of employing a sizeable seasonal work force. Its need for such additional staff is dictated by the change of seasons and thus is bound to recur. It prefers to rehire previous seasonal workers, and its current seasonal complement demonstrates the viability of the policy. Based thereon, I find that the Employer's seasonal workers are eligible to vote.⁶

⁶ I agree with the Employer that their indeterminate tenure, the possibility of year-long retention and the potential for promotion to permanent positions also make the seasonal employees eligible under the Board's test for temporary

6. Accordingly, based upon the foregoing and the record as a whole, I conclude that the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:⁷

All full-time, regular part-time and seasonal grounds and indoor maintenance employees employed by the Employer at its facilities located at 5950 Gratiot, Saginaw, MI; 950 North Center, Saginaw, MI; 7475 East Holland, Saginaw, MI; 300 Ridge Rd., Bay City, MI; and 565 North Meridian, Midland, MI; but excluding superintendents, guards and supervisors as defined in the Act, and all other employees.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Petitioner.

Dated at Detroit, Michigan, this 11th day of May, 1999.

(SEAL)

/s/ William C. Schaub, Jr.

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employees. *WDAF Fox 4*, 328 NLRB No. 10 (Apr. 7, 1999); *Kinney Drugs, Inc.*, 314 NLRB 296, 317 (1994), enf. denied on other grounds 74 F.3d 1419, 1435 (2nd Cir. 1996); *Personal Products Corp.*, 114 NLRB 959, 960 (1955).

⁷ Although the unit as found appropriate herein, which includes seasonal employees as eligible voters, is larger than that petitioned-for, I am administratively satisfied that the Petitioner has a sufficient showing of interest.